

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
08 EDC 3207

Student, by parents or guardians
Father and Mother
Petitioners,

v.

Durham Public Schools
Respondent.

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FINAL DECISION

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge Presiding, on May 18-22 and June 2, 2009 at the office of Administrative Hearings in Raleigh, Wake County, North Carolina. Closing arguments were concluded on June 2, 2009, thereafter, both parties submitted proposed final orders.

APPEARANCES

For Petitioners:

Father
Pro se and as attorney of record for
Student and Mother
Durham, NC 27717

For Respondent:

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WITNESSES

For Petitioners:

Mother
M.A.C.
Ms. R.W.
Father

For Respondent:

Ms. P.H. (a.k.a. *Ms. P.H.*)
Ms. L.S.

Ms. C.M.
Ms. V.S.

EXHIBITS

The following exhibits were received into evidence: Petitioners' Exhibits Nos. 1, 2, 3 (also marked Respondent Ex. 14), 5, 6, 7, (also marked Respondent Ex. 1), 8 and 9.

Respondent's Exhibits 1, 2-6, 14, 35, 39 (page 1 only), 40, 42-47, 50 (pages 3, 4, and 9 only), 51 (pages 5 and 6 only), 58 (page one only), 60 (page 1 and 2 only), 61 (page 17 only), 78-79, 111-115, and 120 (admitted under SEAL).

Respondent's Exhibits 123, 124 and 125 are published for illustrative purposes but not admitted as probative evidence.

The exhibits have been retained as part of the official record of this contested case.

STIPULATIONS

The parties proposed a Pre-Trial Order which was approved and filed in the Office of Administrative Hearings on May 18, 2009. The stipulations contained in this Order and as may otherwise appear in the official record of this contested case are incorporated herein by reference.

ISSUES

Taking into consideration all of the evidence presented in this hearing, and giving all evidence its due weight and consideration, the undersigned has determined the issues to be decided in this case are:

1. Whether the IEP developed in March 2008 by *Student's* IEP team was designed to provide *Student* with an opportunity for a free appropriate public education;
2. Whether Respondent's refusal to engage in discussions at the March 2008 IEP meeting regarding a shadow aide for *Student* as a related service is a procedural violation of the IDEA, and if so, whether that violation:
 - a. impeded *Student's* right to a free appropriate public education;
 - b. significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*, or
 - c. caused a deprivation of an educational benefit; and

3. Whether the private program selected by petitioners from February 2008 through February 2009 was appropriate under the IDEA.

Based upon the Stipulations of record and the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

In making the following findings of fact, the undersigned has considered only the admissible evidence introduced at the hearing. The undersigned has weighed such evidence and has assessed the credibility of the witnesses by taking into account the appropriate and traditional factors for judging credibility, such as the demeanor of the witness, the manner and appearance of the witness, any interests, bias, or prejudice the witness may have, the apparent understanding and fairness of the witness, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other credible evidence in the case. Based upon the foregoing, the undersigned make the following findings of fact:

1. Respondent is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*, (IDEA) and was responsible for providing special education to *Student* pursuant to Article 9, Chapter 115C, of the North Carolina General Statutes, when *Student* was enrolled in Respondent's schools.
2. Petitioners *Mother* and *Father* ("parents") are the parents of *Student*, who was enrolled in Respondent's schools from January 2007 through February 2008 in the preschool program. At the time of the hearing, *Student* was five years old.
3. The parents became concerned about *Student's* development around the eighteen month mark, because *Student* had developed no speech, would not answer to his name when called, and generally appeared to be in his own world. (T. Vol. 3, p. 97)
4. This concern led the parents to consult with their pediatrician at Regional Pediatrics in Durham, North Carolina, regarding *Student's* development. Upon the advice and counsel of their pediatrician, the parents elected to wait until *Student* was two years old before readdressing their concerns with the hope that *Student* would begin to develop speech and that his other symptoms would improve in the meantime. (T. Vol. 3, p. 97).
5. At *Student's* two-year birthday, his symptoms had not improved. At this point, the parents' pediatrician advised them to inquire into speech therapy for *Student* with the Duke Speech Pathology clinic in Durham, North Carolina. *Student* received speech therapy from Duke Speech Pathology for approximately five weeks. During the time when *Student* did receive therapy from Duke Speech Pathology, his therapist recommended that the parents inquire into receiving services through the Child Developmental Services Agency ("the CDSA") of Durham County, North Carolina. (T. Vol. 3, p. 98).

6. The parents did contact the CDSA in the Spring of 2006. After initial contact, the CDSA performed intake evaluations on *Student* and began rendering services to him. (T. Vol. 3, p. 98).
7. The services which *Student* received from the CDSA consisted primarily of speech therapy and play therapy, generally two to three times per week for about forty-five minutes per session for each. Those services began around March or April of 2006 and concluded in January of 2007. (T. Vol. 1, p. 48).
8. The parents paid for the play therapy that *Student* received through the CDSA up until January of 2008 in order to augment *Student*'s educational program from January 2007 through January 2008. (Resp. Ex. 79, p. 19).
9. *Student* stopped receiving services through the CDSA in January of 2009 upon his third birthday. The reason for this discontinuation of services was that, upon *Student*'s third birthday, he fell under the jurisdiction of Durham Public Schools, (herein "Respondent"). (T. Vol. 1, p. 49).
10. In the Spring of 2006, the parents made an appointment with Dr. Worley of Duke in the hopes of receiving some diagnosis of the developmental delays they were seeing in *Student*. (T. Vol. 3, p. 99).
11. In the fall of 2006, the parents were seen by Dr. Worley, and *Student* received a diagnosis from Dr. Worley of "Autism" as a result of that appointment. (T. Vol. 3, p. 99).
12. In January 2007, *Student* was found eligible for special education services under the category of autism and began receiving exceptional children's services in a self-contained classroom for children with autism in Respondent's XX Elementary School. At the time these services began, *Student* was three years old. (T. Vol. 1, p. 4).
13. Services were delivered pursuant to an Individualized Education Plan developed at a January 2007 IEP team meeting in which the parents participated (the January 2007 IEP). (T. Vol. 1, p. 95). The January 2007 IEP was to be in place from January 22, 2007 until January 11, 2008, unless earlier changed by the IEP team. (Resp. Exh. 4).
14. *Student* began attending XX Elementary School on January 22, 2007. (Resp Exh. #4). *Student* enjoyed his time at XX Elementary School, due in large measure to his teacher, *Ms. P.H.* and her assistant, *Ms. F.*. (Resp. Exh. #51, pp.5-6).

15. The January 2007 IEP called for *Student* to receive 20 hours of preschool services each week, as well as three weekly sessions of Speech Therapy and one weekly session of Occupational Therapy. (Resp. Exh. #4).

16. The classroom at XX Elementary School had a maximum of six students in the class at any one time. All of the children had a diagnosis of a disability on the spectrum of autism disorders. (T. Vol. 4, p. 662).

17. At the time of the adoption of the January 2007 IEP, *Student* had limited skills in numerous areas, including the ability to focus his attention, interact with peers, and in his language skills. (T. Vol. 1, pp. 98-101).

18. Structured work activities in Ms. P.H.'s classroom were intended to develop skills so that students could independently complete tasks, which *Student* was not able to do when he first began preschool at XX Elementary School. (T. Vol. 4, p. 667).

19. When *Student* started attending XX Elementary School, he had difficulty remaining on task for any measurable period of time. Ms. P.H. found it difficult to gain and hold his attention, and he had limited eye contact. (T. Vol. 4, pp. 674-676). The January 2007 IEP contained a goal to assist *Student* in remaining on task and improving the quantity of his work product. The present level of performance for this goal described *Student* in January 2007 as follows:

[*Student*] enjoys activities that allow him to explore with his hands such as with manipulative items and art materials per parent report. Upon observation and parent interview [*Student*] moves quickly from one activity to the other between many centers playing briefly with objects and materials. By observation it is likely that he will have difficulty with routines and transitions. During the testing evaluation it was difficult to gain and hold his attention.

(Resp. Exh. #4-2).

20. To support *Student* in this area, the January 2007 IEP contained the following goal: [*Student*] will increase work behaviors by increasing attention to teacher directed activities, participating in classroom activities, and following directions and classroom routines. (Resp. Exh. # 4-2). This goal was supported by 6 *Student* benchmarks or short-term objectives, all of which *Student* mastered by May of 2007. (T. Vol. 4, p. 678).

- a. Short-Term Objective One: Attend to a teacher-directed activity from start to product to clean up for three (3) consecutive minutes by May 2007 and for five (5) consecutive minutes by September 2007. (T. Vol. 4, p. 676) and (Resp. Exh.# 4). Ms. P.H. testified that *Student* met both of these benchmarks by May 2007. *Student* was able to work with Ms. P.H. for various lengths of time, for up to 15 minutes, even in non-preferred activities. (T. Vol. 4, pp. 676-677).

- b. Short-Term Objective Two: Participate in classroom routines such as centers, transitions, and lunch with adult support by September 2007. *Student* was able to do these things without adult support long before September 2007. (T. Vol. 4, p. 678).
- c. Short-Term Objectives Three and Four: Transition between activities smoothly and follow teacher directions and accept limits when told “no,” without behavioral upsets. *Student* was supposed to achieve these objectives with adult support by September 2007 and with only cues and prompts by the end of his IEP. (Resp. Exh. #4). *Student* achieved these objectives by May 2007. (T. Vol. 4, p. 678).
- d. Short-Term Objectives Five and Six: Attend to and participate in circle time activities by imitating actions, words, and songs by the end of the IEP and Stay within a center of his choosing for up to three (3) minutes by September 2007 and for up to five (5) to seven (7) minutes by the end of the IEP. (Resp. Exh.#4). *Student* achieved these objectives by May 2007. (T. Vol. 4, p. 678).

21. *Ms. P.H.* completed notes regarding *Student*’s progress on his attention and classroom participation goal in March 2007. (T. Vol. 4, p. 681). Those notes reflect that by that time, *Student* was attending to teacher directed activities from start to finish, participating in classroom routines with very little assistance and understanding a number of cues and prompts. *Ms. P.H.*’s notes also reflect that *Student* was transitioning with no difficulty and that *Student* enjoyed circle time, that he was staying in centers for greater than 7 minutes with adult supervision and that he was following teacher directions with virtually no behavioral issues. (Resp. Exh. #35).

22. *Ms. P.H.* also completed notes regarding *Student*’s progress in May 2007. (T. Vol. 4, pp. 679, 682). Those notes reflect that by that time *Student* was transitioning smoothly, attending to teacher directed activities for five consecutive minutes, and able to focus from start to finish. (Resp. Exh. #35).

23. By March 2007, *Student* was transitioning with little to no assistance and was typically following directions. *Student* was having few tantrums, and although he was not always sharing trains he had given single train cars to classmates without prompting. *Student* was playing well with friends in the block center. (Resp. Exh. #35).

24. By the time *Student* left *Ms. P.H.*’s classroom, he was able to transition at least five times per day using pictures and without pictures. He also was able to follow classroom directions, although there were times that he chose not to do so. *Student* choosing not to follow directions was infrequent, and he was easily redirected. (T. Vol. 4, pp. 708-09).

25. *Student* was independent in completing work activities by August 2007. His activities at that time included puzzles, matching color activities, matching shapes, building blocks, and imitating block designs. Those were completed at a higher level than when *Student* started at XX Elementary School. (T. Vol. 4, p. 711).

26. When *Student* started at XX Elementary School, he did not have strong play skills. *Mother* reported he had some pretend play skills, and *Ms. P.H.* testified that when he entered her classroom in January 2007, *Student* could engage in “parallel play,” playing alongside another child, rather than engaging with other children. (Resp. Exh. #4). (T. Vol. 4, p. 669). The present level of performance for this goal described *Student* in January 2007 as follows:

[*Student*] is a sweet, little boy who enjoys dump and fill play. He is also able to quickly able [sic] to complete simply form board puzzle and place pegs in a pegboard. [*Student*] parallel plays with peers, but is not yet interacting with them. He will sit for very brief periods of time, and likes to moves [sic] from one play activity to another quickly. He has difficulty with handling objects correctly. He will often handle toys/objects roughly by banging/crashing them on surfaces. He is not yet showing interest in pretend play schemes. *Mother* reports that his pretend play has improved. He will play with food objects, feed a baby, and pretend to feed his mother.

(Resp. Exh.# 4-03).

27. To strengthen *Student*’s play skills, the January 2007 IEP contained the following goal: “[*Student*] will improve his overall play skills to enhance his preschool experience by improving his ability to engage in role play with peers and adults.” (Resp. Exh. #4). The short-term objectives for that goal required *Student* to use toys, objects, and materials in a functional manner independently by September 2007; engage in role playing with one object with a peer by May 2007; engage in role playing with two or more objects consistently with an adult and a peer across settings by September 2007; engage in two-step play schemes by November 2007 consistently across a variety of settings and with a variety of adults/peers; and pretend that objects are something other than what they are by the end of the IEP. (Resp. Exh. #4). *Student* achieved all of those short-term objectives by May 2007. (T. Vol. 4, pp. 685-689).

28. *Ms. P.H.* completed notes regarding *Student*’s progress on his play goal in May 2007. (T. Vol. 4, p. 689). By May 2007 *Student* was able to pretend that objects are something other than what they are and that he was consistently developing more elaborate play schemes. (Resp. Exh. #35).

29. The January 2007 IEP also included a goal designed to increase *Student*’s awareness and interaction with those around him in a more pragmatic and deliberate way. His present level of performance described *Student* as follows:

[*Student*] shows some initial awareness of others when they approach him. However, he does not respond to their greetings, but continue[s] to engage in the activity he is currently involved in. He was noted to engage briefly in short social interaction to make his wants known, but is not yet using words. He will use gestures/signs to communicate with others. He also

does not consistently respond to his name and/or safety commands, such as stop, come here, etc. He also does not like to share toys with other peers in his environment.

(Resp. Exh. #4-04).

30. To support *Student* with these pragmatic communication limitations, the IEP included a goal that focused on increasing his pragmatic language skills for better interactions with his peers. The short-term objectives included responding to greetings from adults/peers through the day, respond to interaction initiated by others, initiate interaction with peers during classroom activities, respond to his name and safety commands with the cessation of the activity by the end of the IEP, share toys/materials with a peer during play, and response space and demonstrate awareness of other people and materials. (Resp. Exh. #4-04).

31. According to *Ms. P.H.*'s testimony, *Student* met those objectives during the time that he was in her classroom. (T. Vol. 4, pp. 691-96). By early winter *Student* was independently initiating interaction with his peers. According to *Ms. P.H.*'s testimony, *Student* "would take a friend by the hand and say, 'Come on' and name his friend and lead him to an activity he wanted to [do] or demonstrate to him what we were supposed to do if they did not understand." (T. Vol. 4, p. 695).

32. *Ms. P.H.* documented *Student*'s growth in his area of play and interaction with his peers in two short recordings of *Student* in the classroom. According to *Ms. P.H.*'s testimony, the videos were typical of *Student*'s engagement with other children in the classroom. In one video, *Student* makes eye contact with a peer and engages in a level of interaction not typical for children with autism. According to *Ms. P.H.*'s testimony, this video demonstrates how much progress he made from when he started in the classroom and made almost no eye contact with anyone. (T. Vol. 4, pp. 728-29) and (Resp. Exh. #120).

33. The second video shows *Student* building blocks with a classmate and then singing Ring Around the Rosie. A third classmate interfered with this game when he kept knocking the blocks over, interfering with *Student*'s ability to continue playing. *Student* did not become upset with his classmate for interfering with the game, but rather, adjusted and made a new game out of it. (T. Vol. 4, p. 727-729) and (Resp. Exh. #120).

34. According to *Ms. P.H.*'s testimony, *Student* had mild behavioral difficulties in her classroom. By the fall and winter, *Ms. P.H.* began taking note of when *Student* had temper tantrums because they were seldom. (T. Vol. 4, p. 697). *Student* had a tantrum in *Ms. P.H.*'s classroom in mid-December; according to her notes, his previous tantrum took place on November 6. (T. Vol. 4, p. 754).

35. By the time *Student* left XX Elementary School, he was able to accept limits and adult directives with no behavioral upsets and shared most materials with peers, although he did still struggle approximately once per week with sharing trains. (T., Vol. 4, pp. 709-10).

36. In January 2007, *Student* had limited functional language skills. According to *Ms. P.H.*'s testimony, *Student* had very limited language skills when he first entered her classroom, speaking primarily in one-word utterances. (T. Vol. 4, pp. 664-65). The present level of performance on the January 2007 IEP described *Student*'s language skills as follows:

Per report, [*Student*] is now able to engage with others for 1-2 minutes if the task is motivating. He is now using gestures to communicate consistently for "up", "outside", "tv", "play movie" and "choo choo". [*Student*] is now using words more often during play including "no, go, choo, up, ball." [*Student*'s] family has constructed a PECS book for him to use at home during meals and daily routine with some success. [*Student*] would benefit from a picture exchange system at school to improve his functional use of language.

37. To help improve *Student*'s use of functional language, the January 2007 IEP contained a functional language skills goal that includes multiple short-term objectives: use gestures or a switch device to request recurrence of action (e.g., more tickles, blow more bubbles); use gestures (e.g., making contact with an adult, giving object to adult) to request help from an adult; use gestures to request preferred foods, toys, or activities; make a choice between 2 objects to indicate a preference; use single pictures or words to make request for foods, toys, or activities; respond to his name and safety commands; point to pictures on an aided language board during structured play.

38. *Student* experienced growth in language that exceeded the expectations of the January 2007 IEP team. According to *Ms. P.H.*'s testimony, by the time *Student* left her classroom, *Student* was regularly using words throughout the day and he was using full sentences in her classroom, including, "I want more candy, please," and "I'm a princess," during pretend play. He was using words so frequently that she only made note of when he used more elaborate words. (T. Vol. 4., pp. 692-93).

39. According to *Ms. P.H.*'s testimony, by August 2007 *Student* had already begun to recognize and understand some colors and shapes and letters and numbers. (T. Vol. 4, p. 707). *Ms. P.H.* also testified that *Student* had more knowledge than she was able to identify because he often would not wait to follow directions and would label an item before he understood what the teaching staff were asking of him. (T. Vol. 4, p. 708). *Student* was still working on waiting to hear full directions before engaging in a task and using discrimination skills to demonstrate prereadiness skill knowledge. (T. Vol. 4, pp. 710-11).

40. During the spring of 2007, the parents were pleased with *Student*'s placement in the XX Elementary School Elementary School classroom. (Resp. Exh. #51). In a letter to a school system staff member, the parents wrote that *Student* was thriving in *Ms. P.H.*'s classroom. The letter states that the teachers had informed the parents that *Student* had already progressed in his workstation activities and also said that "*Student*'s immense happiness and success at XX Elementary School make it the ideal place for him to continue his time in Durham Public

Schools.” Petitioners also stated that *Student’s* teachers recognized his progress to that point and “the fact that he will most likely continue to make great strides.” (Resp. Exh. #51-5).

41. The IEP that resulted from the January 12, 2007 IEP meeting was reviewed on May 22, 2007. (Resp. Exh. #4, p. 7). At the May 22, 2007 meeting, *Student’s* present level of performance was amended, his goals were amended, and he was determined to be ineligible to receive extended services. (Resp. Exh. #4, p. 7).

42. Over the course of the Summer 2007 intersession, the parents received notice that *Student’s* time at XX Elementary School was being reduced from twenty hours per week to eleven hours per week. No IEP meeting was convened to address that change prior to that decision being implemented. (T. Vol. 1, pp. 116-117); (T. Vol. 4, p. 165-166); (Resp. Exh. #78, pp. 40-42). However, on 30 August 2007, another IEP meeting was convened for the purpose of officially changing the service delivery portion of *Student’s* IEP. (Resp. Exh. #3, p. 6).

43. *Student’s* IEP team convened in August 2007 and drafted new goals for him in the August 2007 IEP. At that time, *Student’s* level of service was also changed on his IEP, from 20 hours per week to 12.75. *Student* also began receiving speech therapy four times a week, prior to the start of the regular school day. The IEP continued to call for 30 minutes of Occupational Therapy each week.

44. *Student’s* August 2007 contained goals for social interaction, language development, and classroom participation. (Resp. Exh. #3).

45. During the fall of 2007, Respondent’s autism consultant and expert witness, *Ms. L.S.*, began observing *Student* and providing training to *Ms. P.H.* regarding strategies that could prove effective for *Student*. When *Ms. L.S.* visited the classroom she provided some guidance in the form of demonstration or notes. (T. Vol. 4, p. 802-03); (*see also* T. Vol. 4, p. 735). During the fall of 2007, *Ms. L.S.* observed *Student* for approximately 24 hours. (T. Vol. 4, p. 846-47).

46. *Ms. L.S.* created a verbal behavior profile of *Student*. A verbal behavior profile lists the types of verbal behavior units and provides space for *Ms. L.S.* to indicate whether *Student* used the unit appropriately, defectively, or overusing it. (T. Vol. 4, pp. 807-08). *Ms. L.S.* testified that the purpose of the verbal behavior profile is to assist her in thinking about the types of goals that would help *Student* in his classroom and how the teacher can interact with him effectively. (T. Vol. 4, p. 841). *Ms. L.S.* noted that *Student* didn’t demand things. If *Student* didn’t understand what was being asked of him he would label something. *Ms. L.S.* also noted that *Student* echoed a great deal. *Student* was quick to follow vocal cues from *Ms. P.H.*. He frequently missed questions that she asked of typically developing children. *Student* responded well to fill-ins. (T. Vol. 4, pp. 812-18).

47. During the hearing, *Ms. L.S.* described *Student* as “very vocal” and stated that he would sometimes talk when it wasn’t his turn to talk. He understood that talking is used to communicate with those around you, but his verbal utterances were not always meaningful conversation. When by himself, he would not typically talk to himself but would be engaged

with something else. *Ms. L.S.* also testified that *Student* liked to label and echo what other people were saying. (T. Vol. 4, p. 850).

48. *Student's* August 2007 IEP was scheduled to expire in January 2008. (T. Vol. 4, p. 715-16) and (Resp. Exh. #3). For the January IEP meeting, *Ms. P.H.* was considering other classroom options for *Student* because her classroom had limited opportunities for social interaction with peers. She wanted *Student* to move to a classroom that would allow him more opportunities for social engagement and ultimately, toward the goal of being in a regular kindergarten classroom. (T. Vol. 4, p. 714-15).

49. In November of 2007, *Mother* attended the National Autism Conference in Atlanta, Georgia. (Res. Exh. #79, p. 9). While at the Conference, *Mother* listened to speakers on topics ranging from biomedical interventions to behavioral modifications. (Resp. Exh. #79, p. 9, 19-11). In particular, *Mother* observed Dr. Mitchell Perlman. Dr. Perlman could target therapies that would be most beneficial for children on the autism spectrum and could provide a prognosis for the children he tested and observed. (Resp. Exh. #79, p. 31, 16-33, 14).

50. In November 2007, *Ms. P.H.* spoke with *Father* about scheduling an IEP meeting in order to draft a new IEP for *Student*. During that conversation, *Father* requested *Student's* education records. (T. Vol. 4, p. 719). *Ms. P.H.* provided *Mother* with a date for the meeting, as well as a copy of *Student's* school record. During the conversation *Mother* informed *Ms. P.H.* that she did not want to have an IEP meeting but wanted a "stay put." (T. Vol. 4, pp. 719-20 and Resp. Exh. #47). *Mother* testified at the hearing that when she asked for a "stay put," she meant that she wanted *Student's* services to remain the same until a new IEP was written. (T. Vol. 1, pp. 131-32).

51. On December 13 and 14 2007, Dr. Perlman observed and tested *Student* (Resp. Exh. #14). Dr. Perlman observed *Student's* entire classroom time with *Ms. P.H.* at XX Elementary School on the morning of 13 December 2007. (Resp. Exh. #14, p. 5). After class was over for the day, Dr. Perlman returned to the parents' home where he administered standardized tests to *Student* (Resp. Exh. 14, pp 5-6). Dr. Perlman returned to the parents home on the morning of December 14, 2007. (Resp. Exh. #14, p. 6). He administered additional standardized tests to *Student* at that time. (Resp. Exh. 14, p.6). Prior to his departure, Dr. Perlman indicated that he was leaning towards recommending ABA therapy for *Student* (T. Vol. 3, p. 112). After receiving this informal indication from Dr. Perlman, the parents began investigating the availability of ABA therapy for *Student* (T. Vol. 3, p.112).

52. *Mother* informed *Ms. P.H.* that a specialist would be flying in to review *Student's* records and evaluate and observe *Student*. *Mother* stated that parents would request a meeting after the evaluator made his recommendations. (T. Vol. 4, pp. 719-20).

53. During the conversation, *Mother* discussed different types of methodologies that might be recommended by the evaluator, including ABA. (T. Vol. 4, p. 761).

54. In planning for the upcoming IEP meeting, *Ms. P.H.* spoke with S.H., Respondent's Preschool Coordinator, and other school system staff about possible classroom placements for *Student*. *Ms. P.H.* recommended a less restrictive environment for *Student* (T. Vol. 4, p. 731). Those discussions led to a suggested placement in the preschool developmental needs (DN) classroom at ABC Elementary School. The DN classroom is for children with some delays but the children do not all carry the label of autistic. Many were more vocal than *Student's* current classmates. The DN classroom was adjoined by a Title I classroom, which is a regular education preschool classroom where *Student* could also receive some instruction. Both classrooms had a full-time teacher and full-time teaching assistant. (T. Vol. 4, pp. 731-32), (T. Vol. 5, p. 955-56).

55. *Ms. P.H.* believed that ABC Elementary School was a good option for *Student* because the DN classroom would provide him with a smaller structured setting while he also would have the opportunity to interact with students in the Title I classroom. (T. Vol. 4, p. 731).

56. *Ms. P.H.* believed that *Student* benefited from initiating interaction with his peers because it was important to learn language in an appropriate setting. While *Student* knew many words, he needed to learn to use those words in appropriate situations, and that peers provide the opportunity to play and use language in an appropriate way. (T. Vol. 4, p. 772).

57. The parents considered arranging for ABA services in their home in Durham, but had substantial concerns about the long-term viability of a program, primarily because concerns about the human resources requirement of the ABA program. (T. Vol. 3, p. 113:7-25).

58. The parents learned of the Center for Autism and Related Disorders ("CARD") from Dr. Perlman as a place he recommended for ABA services. (T. Vol. 3, p. 114:1-4). CARD provides ABA therapy services to children with autism and related disorders in their homes so long as they live within a thirty-mile radius of the CARD office. (T. Vol. 2, p. 67:18-21). The program is supervised by Dr. Doreen Granpeesheh, who is a licensed psychologist. (T. Vol. 2, p. 22:10-15).

59. The parents made initial contact with CARD before Christmas. (T. Vol. 1, p. 141). In a December 26, 2007 e-mail to Dr. Perlman, *Mother* stated that after doing the phone interview with CARD "we will then set up the intake evaluation ..." (T. Vol. 1, pp. 136-37).

60. During the latter part of December 2007 and early January 2008, *Father* began asking different staff members of the Respondent about their familiarity with ABA therapy. (T. Vol. 3, pp. 114:12-115:18).

61. *Father* asked S.H. about whether Respondent could provide thirty hours per week of competently delivered ABA to *Student* if that is what his team decided he needed. (T. Vol. 3, p. 114:23-115:18). The Answer that S.H. gave was that such a question was an IEP team decision. (T. Vol. 5, p. 146:11-16).

62. On December 27, 2007, parents participated in telephone interview with the staff at CARD (Resp. Exh. #61, p. 17) to give the parents the opportunity to describe what they were

looking for, to have a question and answer session regarding CARD, and to discuss other topics necessary to see if CARD was appropriate. (T. Vol. 2, p. 65:21-66:5).

63. The parents received a draft of Dr. Perlman's report on December 31, 2007. (T. Vol. 1., p. 141-42). The draft report recommended that *Student* receive 25 hours of one-to-one ABA therapy for approximately six months, after which he should attend school in a regular classroom with a one-on-one "shadow aide." (Resp. Exh. #14).

64. On January 3, 2008, the parents, along with Respondent's P.N. and B.S. visited the developmentally delayed and Title I classrooms at ABC Elementary School. (T. Vol. 3, p. 119:3-9). The parents were disappointed with the methods of instruction, particularly the lack of ABA techniques, and level of interaction, particularly the high ratio of students to teachers. (T. Vol. 3, p. 119:10-120:7).

65. On January 8, 2008, *Student's* IEP team met to revise *Student's* IEP goals and discuss changing his classroom. (T. Vol. 4, p. 734). *Father* participated in the January 8 IEP meeting via telephone. The IEP drafted at the January 8, 2008 IEP meeting is referred to as the January 2008 IEP. The other individuals who participated in the meeting were *Ms. P.H.*; *Ms. L.S.*, Respondent's autism consultant; S.H.; Dr. J.B., Respondent's Director of Programs; and related service providers. (T. Vol. 4, p.735). During the meeting, the team reviewed goals that *Ms. P.H.* had drafted with *Ms. L.S.'s* input. (T. Vol. 4, p. 735). The goals in January 2008 were focused on continuing to develop *Student's* communication and social skills, classroom participation, and motor skills. (Resp. Exh. #2). *Student's* IEP team agreed that *Student* would remain in the classroom at XX Elementary School until Dr. Perlman's report was received, but that they would begin to prepare to transition *Student* to ABC Elementary School. (T. Vol. 4, p. 743 and Resp. Exh. #6).

66. Also at the end of the January 8, 2008 IEP meeting, the team was to reconvene to consider placing *Student* in the developmentally delayed classroom at ABC Elementary School with some time in the adjacent Title I classroom. (Resp. Exh. 5, p. 108:8-24).

67. On January 9, 2008, the parents moved into an apartment in Manassas, Virginia, (T. Vol. 1, p.154:5-10), for the purpose of having a place within the 30-mile radius within which CARD provides its local services. (Resp. Exh. # 79, p. 65:17-19).

68. The rent for this apartment was \$1,256.00 per month for the first twelve months, (Pets. Ex. 2), and was in excess of \$1,300.00 per month for the five-month period from January 2009 through June 2009, (T. Vol. 1, p. 62:16-63:2), all of which totals \$21,572.00.

69. On January 10, 2008, *Father* took *Student* to the CARD headquarters in Springfield, Virginia, where an intake evaluation was conducted by M.A.C. and *Ms. R.W.*. (Resp. Exh. #46, p. 1).

70. During the intake evaluation, *M.A.C.* and *Mr. R.W.* were not only asking questions of *Father* about *Student*, but were also observing *Student* as he played during the interview portion. (Resp. Exh. #46). More specifically, *M.A.C.*'s impression of *Student* at that time was:

At that time B. presented as a child with a very mixed bag of skills. I knew he had a previous diagnosis of autism. He came to us being able to say some words. He was able to label some things that he wanted. He was able to label some of his favorite activities.

However, during the intake process he did not attempt to interact, not only with myself and *Ms. R.W.*, who to be honest he didn't know, but also his interactions with his father were primarily simply based on B. needing something. So for example, if he was playing with the train tracks and couldn't get the pieces to fit together, he would take the train track and hand it to his father in an attempt to get help. He was very difficult to engage in that aspect.

He exhibited quite a bit of echolalic speech, which is--echolalia is the repetition of speech that can either be immediate or delayed. In B.'s case at that time, it was primarily immediate echolalia, to where for example he was even repeating some of the questions that I was asking his father. And then he would actually repeat the same question as he was playing.

He also was not potty trained at the time. He did have some independent play skills with trains, but that was really the only thing that he was interested in. He did not explore the toy room that we were in and became quite fixated on simply playing with the trains and running them around the track.

His receptive understanding was very inconsistent. There were times when we thought he was understanding what we were saying to him. Okay; receptive language is simply being able to follow commands, understand what's being said. But at other times he appeared to either be ignoring the commands, maybe because he didn't want to do them--it was hard to assess that at the time--or not to understand what was being asked of him.

(T. Vol. 2, p. 27:20-29:3).

71. At the meeting, *Father* was informed that CARD had availability and that *Student* was able to be served by them. (T. Vol. 3, p. 591).

72. *Mother* emailed Dr. Perlman on January 17, 2008, and stated that she had been moving to Manassas to be near the CARD offices so that *Student* could start therapy and that *Student* would be starting 30 hours per week of therapy on February 4. (T. Vol. 3, p. 420 and Resp. Exh. #60-1).

73. Dr. Perlman's report was received by the parents and delivered to Respondent via email on January 21, 2008 along with a study published by Jane S. Howard regarding the marked superiority of ABA therapy over other methods of therapy for children with Autism. (Resp. Ex. 50 p. #3).

74. Dr. Perlman's report included results from the standardized tests he administered to *Student* and his analysis thereof. (Resp. Ex. 14). In particular, Dr. Perlman recommended the following for *Student*:

Research has established the *level of intensity* and the *type* of intervention that is effective for remediating and educating children with Autism. Providing one without the other has not been effective in meaningfully altering the learning trajectories of children with Autism: dispelling the myth, for example, that providing virtually any intervention can produce meaningful benefits for children with Autism if it is provided intensively.

- The level of intensity necessary is a *minimum* of 25 hours per week of 1:1 (and at times 1:2) instruction.

- That intensity must be combined with a specific type of intervention: namely, *competently delivered* ABA.

Notably, in addition to the above, research has confirmed that eclectic approaches to educating children with Autism are ineffective: even when competently delivered by staff having considerable training and experience with children with Autism

In my experience, several factors may be associated with better intervention outcomes for children of Autism, and having intelligence that is above Mental Retardation is one of those factors. The fact that *Student* has *at least* Below Average intelligence, then, may indicate a good prognosis if the right levels, type, and duration of intervention is applied.

To this date, *Student* has never had the benefit of receiving the combination of intensity and type of intervention supported by the research. Not surprisingly, then, the combined interventions that he

has received to date have not sufficiently altered his learning trajectory.

I recommend, then, that *Student* receive a minimum of 25 hours per week of 1:1 competently delivered ABA therapy. I am not convinced that *Student* should continue in his current SDC classroom. If there is a clear reason to use it as a support to his ABA intervention, it should be considered, but only as an adjunct and not as a substitute for the minimum hours of 1:1 ABA supported by research.

Still, since *Student* needs to move forward with self-regulation, with socialization, and with language/communication acquisition, his school placement should be with peers that can provide him with the opportunity to socialize and to communicate. Necessarily, that means the other peers cannot be behaviorally-challenged or communicatively handicapped themselves, and there must be a certain level of supervision and sophistication to ensure that opportunities for appropriate interaction and communication are created, that *Student* is able to avail himself of those created opportunities, and that his peers are able to be receptive to the interaction.

It is probable, that if provided with the right level and type of intervention, that *Student* can be readied for a regular education preschool (with ABA shadow-aide support) very quickly, and that by the time he reaches kindergarten ABA shadow-aide support to the regular classroom may not be necessary. I do recommend, in fact, that after six months of intensive ABA intervention, that consideration be given to placing *Student* in a regular education preschool (with ABA shadow-aide support) for a portion of his school week.

(Resp. Exh. #14, p.16) (emphasis in original).

75. Dr. Perlman went on to explain the role of a shadow-aide in more particular detail when he said:

By shadow-aide support, I am referring to a shadow aide specifically trained and skilled in ABA as it pertains to Autism. Notably, I am not equating *trained* to be synonymous with being *skilled*, and the correlations between the two are often very low. Especially with communication and social exchange, teaching and providing for corrective experiences often need to be *caught* in-vivo on a continuous basis. Those having training in Autism but who are also lacking the skills (the skills which are developed

through quality supervised experience) tend to miss discerning the many pertinent experiences that occur everyday and that provide the opportunity for learning and growth. Also, when those occasions are discerned, the interventions are at times awkward and/or inconsistent. Therefore, a trained aide lacking in skills would not be appropriate for *Student*

(Resp. Exh. #14, p. 17) (emphasis in original).

76. The research that Dr. Perlman found instructive has been incorporated in the study published by Jane S. Howard *et al.*, in 2005, which found that therapy for children with Autism that is neither intensive (meaning less than twenty-five (25) hours per week) nor the right type of therapy (anything other than ABA delivered in a 1:1 ratio) has virtually no basis in any sound research and has little to no effect upon the children. (Pets. Exh. #5).

77. The parents' 21 January 2008 email put Respondent on notice that the parents intended to place *Student* in the CARD program in Virginia after having read Dr. Perlman's report and having repeatedly asked whether Respondent could accommodate the types of services Dr. Perlman recommended without receiving an answer thereto. (Resp. Exh. #50, p. 3).

78. *Ms. P.H.* was surprised because Dr. Perlman's report stated that *Student* would only complete one or two items and then run off to watch television. *Ms. P.H.* testified that the report "didn't sound like the child that was in my classroom." *Student* was doing four to five tasks independently and was able to do at least that many in a structured setting. (T. Vol. 5, p. 759).

79. S.H. called petitioners on January 24 and left a message stating that the meeting originally scheduled for the following day would not be held. She left her cellphone number so that *Father* could contact her if necessary. (T. Vol.5, p. 963). *Father* called S.H. that evening. *Father* stated that Respondent provided an eclectic model. *Father* asked whether *Ms. C.M.* would be able to decide whether *Student* would receive 25 hours of one-to-one ABA. *Ms. C.M.* told *Father* that an IEP team would have to make that decision. (T. Vol. 5, p. 964-65).

80. *Ms. P.H.* contacted the parents to cancel the IEP meeting scheduled for January 25, so that the Respondent's staff could take more time to review Dr. Perlman's evaluation. (T. Vol. 5, p. 962-63).

81. *Student* began receiving services through CARD in the parents' apartment in Manassas, Virginia on 4 February 2008. (Resp. Ex. 60 at 1).

82. During *Student*'s time in Virginia, he received anywhere between 21-35 hours of one-on-one ("1:1") ABA therapy from CARD's staff per week. The initial program that was set for *Student* was based upon his assessed individual needs as reflected in the intake questionnaire that was completed by the parents and upon the intake observation that was performed by *M.A.C.* and *Mr. R.W.*.

83. During the course of *Student's* time with CARD, the areas in which instruction was provided covered the following areas: Actions, Attributes, Block Imitation, Body Parts, Categories, Colors, Drawing, Expressive Labels, Fine Motor Skills, Functions, Gross Motor Skills, Object Requests, Play Skills, Prepositions, Receptive Commands, Receptive Objects, Self Help, Sound Recall, Verbal Imitation, Choices, Drawing, Features, Fine Motor Skills, Functions, Gender, I have / I see, Joint Attention, Locations, Object Requests, Occupations, People, Social Questions, Yes / No, Puzzles, Asking Questions, Numbers, Pronouns, Requesting Cessation, Sight Reading, Waiting, Describe, Emotions, Negation, Prepositions, and "Wh" Rotation. (Pets. Exh. #6).

84. During each of the therapy sessions for *Student*, every therapist performed a series of discrete trials (this form of therapy is known commonly as "discrete trial training" or "DTT"). After each discrete trial, and while *Student* would take a break, the therapist made meticulous notes on the number of trials, the numbers for each type of answer (correct, incorrect, or correct with prompt), the percentage for the trial, anecdotal or other notes that would explain the results of the trial. Therapists noted compliance issues that *Student* had (i.e., elopement (leaving the room) or other maladaptive behaviors). (Pets. Exh. #6).

85. Every two weeks, each therapist would meet with *Mr. R.W.*, and occasionally *M.A.C.*, together with *Student* and either *Mother*, *Father* or both for two hours at the CARD headquarters in Springfield, Virginia. These meetings were called "clinics." (T. Vol. 2, p. 82). Each clinic allowed *Mr. R.W.* and/or *M.A.C.* the opportunity to review all of the notes and speak with all of the therapists on *Student's* team to determine progress, refine techniques, and for *Mr. R.W.* and/or *M.A.C.* to personally observe the therapists performing each program. (T. Vol. 2, p. 82). These clinics were essential to ensuring that the program being administered to *Student* by CARD met his unique needs.

86. According to *Mr. R.W.'s* expert testimony, *Student* received substantial benefit from the program that was specifically designed and maintained according to *Student's* unique needs:

Q If I could--if we could move to one of the respondent's notebooks, I believe it's volume number II, Exhibit 46---

A (interposing) Okay.

Q ---and page 4.

A Okay.

(Witness complies.)

Receptive Language is the first one you see?

Q That's correct.

A Okay.

Q So you heard the testimony of *M.A.C.*. Before that, though, can you just at least tell us what this--what Exhibit 46 is?

A Of course. It's our initial intake that we do upon--that we ask questions of the parents and observe the

child.

Q And it was done on what date?

A The 10th of January of '08.

Q Okay. Did B. make progress on being able to understand instructions between January of 2008 and February of 2009?

A Yes.

Q Did he--was he able to identify more objects in February of 2009 than he was in January of 2008?

A Yes.

Q Did he understand abstract concepts such as like what tomorrow means by February of 2009?

A He's beginning to, yes.

Q Okay. Was he able to express his needs better or worse in February of 2009 than he was in January of 2008?

A Much better.

Q Was he able to imitate sounds and words better in 2009 than he was in 2008?

A Yes.

Q Did he use more--did he use language more meaningfully in February of 2009 than he did in 2008?

A Yes.

Q Was he able to label more objects in 2009 than he was in 2008?

A Yes.

Q Was he able to use more phrases and longer phrases in 2009 than he was in 2008?

A Yes. I think his length of utterances now is seven to nine words at least.

Q Was he able to use abstract language--is he now able to use abstract language in his speech more than he was in January of 2008?

A Yes, he's starting to.

Q Is his articulation better in 2009 than it was in 2008?

A Yes.

Q And he's not using any picture exchange systems?

A No.

Q Does he need them?

A Some--well, no, he doesn't use the picture exchanges and he hasn't needed it. No.

Q Has his drawing improved since 2009---

A (interposing) Yes.

Q ---versus 2008?

A Yes.

Q What about his writing?

A He's starting--he's doing Handwriting Without Tears, which is getting--it's a program that basically sets up and systematically shows him how to write letters. And he's starting to write his letters very nicely.

Q Has his cutting improved since 2008?

A Yes.

Q What about his walking, running, and jumping?

A It's fine. It's age appropriate.

Q What about climbing stairs?

A Age appropriate.

Q His overall agility compared to 2008?

A Yes, he's able to catch, throw, kick, all sorts of things.

Q Is he able to feed himself better now than he was in 2008?

A Yes.

Q Is he able to go to the---

A (interposing) He's potty trained.

Q Is he able to dress himself in---

A (interposing) Yes.

Q ---2009? Is he able to groom himself?

A Yes.

Q In the academic skills is he able to handle colors receptively?

A And expressively.

Q What about shades?

A Both expressive--receptive and expressive.

Q What about numbers?

A Receptive and expressive.

Q Letters?

A Receptive and expressive.

Q People?

A Receptive and expressive.

Q Food items?

A Receptive and expressive.

Q Verbs, actions?

A Receptive and expressive.

Q Matching?

A Yes.

Q What about gazing sideways at trains? Does he continue to do that?

A No, not as I've seen, no. We were able to show him how to watch his—look at the--yeah.

Q Does he continue to step on manhole covers?

A I don't think so.

Q Does he tantrum as much in 2009 as he did in 2008?

A Not that I'm aware. I don't think I've seen one in a while.

Q Does he show aggression like he did in 2008?

A Not that I--we've taught him other ways, so I don't think so.

(T. Vol. 2, pp. 181:20-186:6).

87. That same progress was also noted by Ms. Corrigan-Webster, when she testified as follows:

Q ---report? Thank you. Next if I could get you to turn to—
I believe it's Respondent's Exhibit Number 46. I think that's in Volume II.
(Witness complies.)

Q Can you identify Exhibit Number 46 for the Court, please?

A This is the intake that we filled out on B.

Q Okay. If you could turn to page---

A (interposing) I'm sorry. May I correct that? This is the intake that
C.A.R.D. did on B.

Q On what date?

A On 1/10/2008.

Q Thank you. On page 4, there's a section that is entitled Receptive
Language Skills. Do you see that?

A Yes.

Q And it says, "Will do what asked 'some may be contextual' one step
directions" about what B. understands. Was that an accurate description of
what he did at that time?

A Yes.

Q And did he make progress between January 10th of 2008 to
February of 2009 in that area?

A Yes.

Q So he understands more now than he did then receptively?

Ms. Waller: Objection, Your Honor. I don't believe this is—
the witness was never asked about this document in direct or cross-examination.

The Court: I'm providing leeway in that regard. Overruled.

Mr. Webster: Thank you, Your Honor.

By Mr. Webster:

Q Can he--can B. identify more objects now than he did in January of 2008?

A Yes.

Q Does he understand some abstract concepts now that he did not in 2008?

A Yes.

Q Can B. use larger phrases than those reflected in number 1 of Expressive
Language Skills now than he did in 2008?

A Much larger, yes.

Q Can B. imitate words better now than he did in 2008?

A Yes.

Q Does he say things more meaningfully in 2009 than he did in 2008?

A Yes.

Q Does he use as much echolalia now?

A No.

Q Does he label objects better now?

A Yes.

Q Does he use longer phrases now?

A Yes.

Q Does he articulate words better now?

A Yes.

Q Is he using a picture exchange system now?

A No.

Q Does he need one?

A No.

Q Does he draw better now than he did?

A Yes.

Q What about writing?

A Yes.

Q Cutting?

A I don't know.

Q Okay. What about walking, running, and jumping?

A Yes. Yes. Yes.

Q Climbing stairs?

A Yes.

Q His overall agility?

A Yes.

Q Does he feed himself better now than he did?

A Yes.

Q Does he--is he toilet trained?

A Yes.

Q Does he dress himself, or can he dress himself?

A He can, yes.

Q Is he able to wash his hands with soap?

A Yes.

Q Can he brush his teeth?

A Yes.

Q In the academic skills, can he receptively identify his colors?

A Yes.

Q Can he expressively identify colors?

A Yes.

Q Can he receptively identify more than three shapes now?

A Yes.

Q Can he expressively identify more than three shapes now?

A Yes.

Q Can he count higher numbers than 20?

A Yes.

Q Can he do it receptively and expressively?

A Yes.

Q Does he know all of his letters receptively?
A Yes.
Q What about expressively?
A Most of them.
Q Does he know all of his people, all the main people that are in his life?
A Yes.
Q Can he name them expressively and receptively?
A Yes.
Q What about food items? Can he receptively identify them?
A Yes.
Q What about expressively?
A Yes.
Q His actions, can he receptively identify actions?
A Yes.
Q Can he expressively identify actions?
A Most, yes.
Q Can he do matching?
A Matching of?
Q Can you give me an example of how B. can do matching now?
A He can take different groups of animals and different kinds of animals and we can stack them on the table and he can then match them up with the correct group.
Q Does he play any games that involve matching?
A Yes. He plays Memory. He plays Go Fish.
Q Does he need a lot of prompting with those games?
A No.
Q Does he need any prompting with those games?
A Just that it's not his turn all the time.
Q I think I have that problem too. Does he gaze sideways at trains anymore?
A No.
Q Does he step on manhole covers anymore?
A No.
Q Does he throw as many tantrums now as he did in 2008?
A No.
Q Does he hit in conjunction or is he aggressive in conjunction with whatever tantrums he does have?
A Typically, no.

(T. Vol. 3, p. 72:13-77:25).

88. Over the course of *Student's* instructional time with CARD in Virginia, *Student* improved in all areas of instruction. (T. Vol. 2, pp. 158:20-186:6).

89. The Parents paid for CARD services for *Student* in the following amounts: Intake Evaluation (\$450.00); February 2008 (\$3,787.50); March 2008 (\$6,266.50); April 2008 (\$7,041.50); May 2008 (\$5,525.00); June 2008 (\$4,604.00); July 2008 (\$8,858.50); August 2008

(\$6,808.50); September 2008 (\$3,959.00); October 2008 (\$5,542.00); November 2008 (\$4,858.00); December 2008 (\$3,862.50); January 2009 (\$5,591.50); February 2009 (\$7,100.00). (Pets. Ex. 1). These charges total \$74,254.50 in tuition for *Student's* program at CARD.

90. *Student* made progress in the CARD program, including being able to form sentences and increased communication and interaction with his family and others. (T. Vol. 1, p. 66).

91. An IEP meeting, with prior notice convened on the afternoon of March 14, 2008 at ABC Elementary School in Northwest Durham County. (Resp. Exh. #1). In attendance on behalf of the Respondent at the March 14, 2008 IEP meeting were: Ms. P.H., *Student's* teacher at XX Elementary School Elementary; Carolyn Waller, attorney for Respondent; Ms. L.S., licensed psychological assistant and autism specialist for Respondent; Dr. J.B., director of special education programs for Respondent; the autism specialist for Respondent; exceptional children's pre-kindergarten teacher at ABC Elementary School; Title I teacher for ABC Elementary School; occupational therapist for Respondent; director of the Respondent's exceptional children's pre-kindergarten programs; and speech therapist for Respondent. (Resp. Exh. #5, p. 2:12-4:1). In attendance on behalf of the Petitioners at the March 14, 2008 IEP meeting were the parents. (Resp. Exh. 5, p. 3).

92. Prior to the meeting, the parents had provided Respondent with IEP goals drafted by CARD, and Respondent's staff had incorporated some of those goals into the goals that had been adopted at the January 8, 2008, IEP meeting. (T. Vol. 4, p. 763-64).

93. The March 14, 2008 IEP began with detailed discussions of the present level of performance of *Student*, including his strengths. (Resp. Exh. 5, p. 7:5-14:19).

94. That discussion was followed by very detailed and lengthy negotiations over the goals that were being set for *Student* in the IEP. In particular, *Father* was consistently requesting that more stringent requirements be placed upon *Student* given the year long time period for which the March 14, 2008 IEP was supposed to last. (Resp. Exh. #5, p. 16:2-105:22)

95. Ms. P.H. testified that some of the goals drafted by CARD were not incorporated because *Student* had already mastered them or because they were not age appropriate. (T. Vol 4, p.766-68)

96. Respondent's employees also consulted with Ms. L.S. about developing goals that would meet the needs identified in Dr. Perlman's evaluation. T. Vol. IV, p. 855. Ms. L.S. testified that the primary need identified in Dr. Perlman's evaluation—that *Student* “avail himself of practical, receptive, and expressive language as a means to connect with others/events”—remained the focus of the program developed for *Student* and offered at the March 14, 2008, IEP meeting. (T. Vol. 4, p. 858). Ms. L.S. testified that *Student* should not remain in Ms. P.H.'s classroom because he was one of the higher functioning children in the classroom and she believed he would benefit being around peers that had social verbal skills and social communication skills. (T. Vol. 4, p. 864).

97. Petitioners participated in the discussion of goals and short-term objectives. T. Vol. III, pp. 598-99.

98. *Mother* voiced no objection to the information on the first page of *Student's* March 14, 2008, IEP. (T. Vol. 3, pp. 423-24).

99. Neither *Mother* nor *Father* objected to *Student's* present levels of performance in the March 14, 2008, IEP, and *Mother* acknowledged during the hearing that she and *Father* had the opportunity to respond to, add to or detract from the present level of performance for his goals. (T. Vol. 3, pp. 424-430, 436).

100. *Student* was offered a program of 19 ½ hours, with his time split between the DN classroom and the adjoining Title I classroom. (Resp. Exh. #1).

101. *Mother's* testified that she believed that the March 2008 IEP reflected a recommendation by Respondent that *Student* be placed in an eclectic autism classroom. (T. Vol. 1, p. 164-65).

102. Dr. Perlman did not recommend that *Student* be placed in an eclectic autism classroom because he had outgrown the classroom and because "they do not facilitate instances of communicative intent or situations where *Student* can interact with neurotypical children." (T. Vol. 1, p. 167 & Resp. Exh. #50).

103. During the IEP meeting, *Father* asked that *Student* be provided with a one-to-one shadow aide throughout his school day. (T. Vol. 3, p. 537).

104. *Mother* testified during the hearing that the purpose of a shadow aide "is to facilitate the child in several ways, moving between different tasks, helping to relate information—relay information—between the teacher that the child may not understand, just assisting the child to make them more productive in the classroom so that they can hopefully transition into a neurotypical classroom." (T. Vol. 1, pp. 56-57). At the hearing, *Mother* testified that *Student* "wasn't able to function in a classroom without an assistant, I don't feel." (T. Vol. 1, p. 51).

105. Counsel for the Respondent stated that the level of staffing within a classroom is not determined by the IEP team, but rather by the administration. Counsel explained that the IEP team is responsible for describing *Student's* present level of performance, needs, goals, and objectives, and the level of direct support he would need. The administration would then determine how many adults would need to be in the classroom at any given time to meet the needs of all the children in the classroom. Resp. Exh. 5, pp. 156-59.

106. During the IEP meeting, there was extensive discussion of the program being offered to *Student*, including the student-staff ratio at which *Student's* services would be provided. T. Vol. III, p. 467-68. Respondent's expert witness, *Ms. L.S.*, testified during the hearing that *Student* would never be in a group larger than three students.

107. During her testimony, *Ms. L.S.* reviewed two PowerPoint presentations that she created for training purposes and that showed how ABA is delivered to a child in a classroom setting, and also explained how these would be applied to *Student* in both the DN Classroom as well as the Title I Classroom. The classroom is set up in a particular manner to limit distractions for students and define the areas where students transition. Each table has drawers for materials that are going to be used and for students' reinforcers. All teacher materials are stored in cabinets so that there is nothing drawing the children to leave the table. (T. Vol. 5, p. 869-72).

108. The students rotate through different work areas, which allow them to work with different staff and peers. (T. Vol. 5, p. 874-75). The purpose of the rotation is to generalize across people and materials, and the other is to practice transitioning from one activity to the next. (T. Vol. 5, p. 877).

109. Student work is completed either one-to-one, two-to-one, or three-to-one. *Ms. L.S.* testified that the staff-student ratio changes depending on the goals and the tasks. There may be goals the child works on individually, while other goals may require another student or two. *Ms. L.S.* testified that teachers are working up to the child being able to achieve the goal while other students are around. (T. Vol. 5, p. 875).

110. *Ms. L.S.* testified that the purpose of having students learn to do their work with other children next to them is to provide students with the least restrictive environment but also to teach socialization and engagement. Students can learn imitation and observational learning skills when there is someone else sitting next to them. For example, a student might be asked to point to something, with the second student then being instructed to do the same thing that his classmate just did. This type of instruction teaches students that they are still in the lesson plan no matter who the teacher is talking to and that they can get relevant information. (T. Vol. 5, p. 875-76).

111. Data is kept in the classroom through either data books or by sorting the verbal behavior cards into separate piles, for questions that a child missed, for questions that were just introduced, or for skills that are already mastered. (T. Vol. 5, p. 878).

112. *Ms. L.S.* explained that at the table, a student is given a command like "read" or "do what he's doing" and are then reinforced when the student responds appropriately. The reinforcers would be drawn from a list made by the teacher and parents. After a trial is done, while the first child is getting the reinforcer, the teacher may move to another student to give an instruction or return to the first child for another trial, depending on the goal. (T. Vol. 5, p. 879-81).

113. *Ms. L.S.* testified as to the arrangement of the DN classroom at ABC Elementary School, set up for *Student's* program, with a single kidney-shaped table in the corner, to prepare children for working at group tables when they leave pre-K. The room would have bookshelves used as dividers, with white boards in each learning area and toys put away in drawers to avoid distracting students. (T. Vol. 5, pp. 884, 886-87).

114. Ms. L.S. testified as to the arrangement of “pocket topics” on the walls, with the breakdown of specific tasks, so that when the teacher analyzes a task she knows how much of it to introduce to each child. There would also be a teacher reference board that would display the commands that are given to students. (T. Vol. 5, p. 887-88).

115. Ms. L.S. also testified as to the space in the classroom for circle time and play groups, along with an area for instruction in one-on-one play. (T. Vol. V, pp. 888-89).

116. Ms. L.S.’s opinion was that *Student*’s March 2008 IEP be implemented with *Student* in a group of one staff member to no more than three students. The staff member might be classroom staff or a related service provider. *Student* would have received some one-to-one instruction; however, he also needed some instruction with other children because he would be learning to converse and observe and imitate, so he needed other people around him. (T. Vol. 5, pp. 893-95).

117. Ms. L.S. testified as to size of groups in the Title I classroom at ABC Elementary School, *Student* with a small group of no more than three. The staff member working with his group would always have the verbal behavior cards, which contain the commands to be given to the student. The classroom staff would be doing discrete trials with *Student* the whole day. (T. Vol. 5, pp. 896-900).

118. According to Ms. L.S.’s testimony, if *Student* did not have other children around him, it would be difficult to work on all of his goals, because some required other students. (T. Vol. 5, p. 902).

119. Ms. L.S. did not agree with Dr. Perlman’s recommendation that *Student* have a one-to-one shadow aid. (T. Vol. 5, p. 950).

120. Ms. L.S. recalled discussion at the March 14, 2008 IEP of the staffing levels in the DN classroom and that she would have been the person responsible for setting up the classroom for *Student*, a role she has fulfilled in other districts. If Ms. L.S. had determined that there were not enough adults in the classroom to meet *Student*’s needs, she would have recommended additional staffing. (T. Vol. 5, pp. 907-07).

121. At the March 14, 2008, IEP meeting, Respondent’s staff explained that the teachers in the DN classroom and the Title I classroom at ABC Elementary School were both special education certified. Respondent’s staff also explained during the meeting that *Student* would work on IEP goals in both classrooms. (T. Vol. 3, pp. 441-42).

122. During the March 14, 2008, IEP meeting Respondent offered to provide eight hours of consultation per month by Ms. L.S.. (T. Vol. 3, p. 442-43, 594). The program offered to *Student* was described during the meeting to petitioners as a rigorous, controlled ABA program. (T. Vol. 3, pp. 455). Petitioners were told that *Student*’s ABA would go with him throughout his school day. (T. Vol. 3, pp. 445-46). The data collection methodology was described to petitioners during the IEP meeting. (T. Vol.3, pp. 447-49, 595). There was also discussion of the possibility of additional staff being added to the classroom, depending on *Student*’s progress. (T. Vol. 3, pp.

462-63). During the March 14, 2008, IEP meeting, Respondent agreed that the teaching assistant from the DN classroom could accompany *Student* to the Title I classroom in order to assist him as needed in the Title I classroom. (T. Vol. 3, pp. 477-78; Vol. 5, p. 957).

123. According to S.H.'s testimony that if a child's IEP indicated that he needed a high level of one-to-one support, Respondent would look at the number of children and personnel in the classroom to determine whether there was already staff to meet those needs. Respondent would then look at the related services providers' schedules to determine when a classroom would already have additional staff.

124. *Ms. L.S.*, with her training in verbal behavioral analysis, was to serve as the consultant for *Student's* program, to make sure staff were trained, that the classroom was set up the way it should have been, to ensure proper data collection, and to monitor the program. (T. Vol. 5, p. 967-68).

125. *Student's* program would use ABA therapy, but not always provided one-to-one. (T. Vol. V, p. 968).

126. *Ms. C.M.* testified that once the IEP team, including parents, agreed upon a program, Respondent's staff determine what level of staffing was needed to deliver that program. (T. Vol. 5, p. 987-88).

127. The parents were willing to accept the Respondent's program with only 19 ½ hours of services, as long as a shadow aide was provided. (T. Vol. 3, p. 551, 597).

128. In *Ms. L.S.'s* expert testimony, the IEP developed for *Student* was appropriate. The program included eight (8) hours of consultation a month, with four hours scheduled for intensive training for school staff working with *Student* and four hours scheduled in the home, in order to provide consistency and communication between the school and home. *Ms. L.S.* was to visit the classroom and recommend any additional training or support staff needed to provide *Student's* program. (T. Vol.5, pp. 903-06).

129. *M.A.C.* testified that during the intake observation on January 10, 2008, "*Student* presented as a child with a very mixed bag of skills." She testified that he was able to say some words and label some things that he wanted and some favorite activities. She also testified that he didn't attempt to interact with either her or *Ms. R.W.* and that his interaction with his father was limited to needing assistance with something. *M.A.C.* testified that *Student* exhibited quite a bit of echolalia, which is the repetition of speech, and that he was not potty trained. *M.A.C.* also testified that *Student* showed no interest in any of the toys in the room other than the trains, and that his understanding of what was being said to him was inconsistent. (T. Vol. 2, pp. 200-02). *M.A.C.* testified that *Father* had informed her that *Student* was not interacting with his brother at the time of the intake interview in January 2008. (T. Vol. 2, p. 202).

130. *M.A.C.* did not observe *Student* in his classroom at XX Elementary School. (T. Vol. 2, p. 281). She did not recall reviewing *Student*'s educational records, and she did not speak to any of his educational providers at XX Elementary School. (T. Vol. 2, p. 281-82).

131. *M.A.C.* noted that "play is very important for children, all children, to develop, and specifically it's something that we know is very difficult for children with autism to develop as well." (T. Vol. 2, p. 212).

132. *M.A.C.* observed that impaired social behavior is the most consistent concern observed with children with autism spectrum disorders. Impaired social skills can include very simple social skills such as a failure to make eye contact, not responding to their names, an inability to read facial expressions, body movements, and social cues, and the failure to develop age appropriate peer relationships, so they're not developing friends and being able to play in a way that would be considered age appropriate with their peers. (T. Vol. 2, pp. 225-26).

133. According to *M.A.C.*'s testimony that sometimes it's better to move a child into a more restrictive environment for a short period of time in order to be able to get them into a less restrictive environment. For a child that doesn't have speech yet, limited play skills, little eye contact, it is difficult to ask that child to go and interact with another child. (T. Vol. 2, p. 213).

134. According to *M.A.C.*'s testimony, "at this time ABA is the only method that has consistent research behind it as far as providing consistent results for children with autism." (T. Vol. 2, p. 208).

135. *M.A.C.* testified about a study conducted by Jane Howard and colleagues in 2005, comparing three groups of children. The three groups were a group receiving intensive behavior analytic intervention, a group receiving intensive intervention in an eclectic public school program, and a group in a low-intensity special education program. According to *M.A.C.*, the high intensity groups received 25 to 40 hours per week of services and the low-intensity group received 15 hours per week of instruction. (T. Vol. 2, p. 208-09).

136. According to *M.A.C.*, the study concluded that the children in the intensive behavioral therapy program "showed increases in skills above and beyond the children in the other groups across the board." The children who received ABA treatment outperformed the other children in all areas. (T. Vol. 2, p. 209).

137. *M.A.C.* was unaware that the program offered in March 2008 by Respondent was an ABA program to be delivered throughout the school day, across environments and in a setting of no more than three-to-one. *M.A.C.*'s opinion was that the program offered for *Student* by the respondent at the March 14, 2008, IEP meeting was most like a low-intensity eclectic program. She also testified that based on her partial review of the IEP meeting audiotape, *Student* was being offered an eclectic classroom. (T. Vol. 2, pp. 269-71).

138. *Ms. R.W.* is the direct supervisor of *Student*'s CARD program. (T. Vol. 2, p. 318) Prior to the hearing, *Ms. R.W.* did not review the written IEP developed at the March 14, 2008, IEP

meeting. *Ms. R.W.* did not speak with *Student's* teachers, providers, or other IEP team members. *Ms. R.W.* did not review *Student's* educational records, other than listening to a portion of the audiotape of the March 14, 2008 IEP meeting. (T. Vol. 2, pp. 369-70). *Ms. R.W.* did not observe *Student* with his peers in an educational setting until *Student* began attending preschool in January 2009. (T. Vol 2, p. 394-95).

139. *Ms. R.W.* testified that for the initial components of *Student's* CARD program, she was attempting to get him to demonstrate what he already knew, rather than teaching him. (T. Vol. 2, p. 365-66).

140. When *Student* began the CARD program he would complete a three (3) to five (5) minute lesson and then take a five (5) to seven (7) minute break. (T. Vol. 2, pp. 388-89). *Student* started the CARD program he would run away from the therapy table constantly throughout the session. (T. Vol. 2, p. 394) During his time in the CARD program, *Student* demonstrated some maladaptive behaviors, including tantruming, spitting, and hitting. *Student* sometimes hit himself and sometimes hit the therapists or *Ms. R.W.*. (T. Vol. 2, p. 371). *Student* was tantruming "constantly at the beginning" of his year in the CARD program. *Ms. R.W.* testified that when *Student* tantrumed, he would whine or cry 10 to 15 times per two-hour session. (T. Vol. 2, pp. 374-75).

141. According to *M.A.C.'s* testimony, if CARD develops good reinforcers for a child, they can control compliance issues and see very little "excess tantrum behavior." (T. Vol. 2, p. 253).

142. According to *Ms. R.W.'s* testimony, a shadow-aide facilitates social interaction and helps the child with everything, whether it's prompting the child through academics, speaking for the child if he is nonverbal, or managing maladaptive behaviors. According to *Ms. R.W.*, a shadow aide give the child an "extra nudge" to inform the child of what they are supposed to be doing or to provide extra help "if the teacher can't provide it because there's... 20 other kids in the classroom." (T. Vol. 2, pp. 359-60). *Ms. R.W.* did not believe that *Student* would have required direct assistance throughout his day regardless of the type of activity or what was being focused on academically. Rather, *Ms. R.W.* believed that *Student* may need direct support for social interactions and for transitions. Another adult in the classroom could be trained to give him the direct support at the times that he needs it. (T. Vol. 2, pp. 398-99). *Ms. R.W.* acknowledged that an adult in the classroom who was already an employee of Respondent and who was familiar with *Student's* program and available to provide him direct support when he exhibited a need for it would be able to provide him with support. (T. Vol. 2, p. 398-400).

143. *Student* made progress in a number of areas in the CARD program, including understanding instructions, identifying objects, understanding abstract concepts, expressing his needs, imitating sounds and words, using language more meaningfully, identifying and labeling a number of categories, and engaging in aggressive and tantruming behavior. (T. Vol. 2, pp. 355-59).

144. The CARD program was more restrictive than the program offered by Respondent, but *Father* believed the more restrictive program is what *Student* needed at the time. (T. Vol. 3, p. 539).

145. Dr. Victoria Shea testified on behalf of Respondent as an expert witness. Dr. Shea reviewed *Student*'s education records, Dr. Perlman's report, other evaluations of *Student*, correspondence between the Petitioners and Respondent, and some CARD intake documents. (T. Vol. 6, p. 1011)

146. Based upon Dr. Shea's expert opinion, eclectic classrooms use a unique combination of strategies and that there is no standard eclectic classroom. No two eclectic classrooms are alike. Research demonstrates that students may benefit from less than 25 hours per week of one-on-one ABA therapy. There is "a fairly clear consensus in the professional research literature now that we're not able to identify any particular intensity of service that is optimal." "Intensity" referred to the number of hours. One study demonstrates that students made progress with an average of between 11 and 15 hours per week of services. Another study looked at students in two groups, one of which received 12 to 27 hours of service per week and the other 28 to 43 hours of service per week. The researchers found that "both groups made progress, but the amount of progress was not predicted by the number of hours." Another study compared students who were in home-based early intervention, students in intensive intervention and those who were in preschool. Those researchers did not find differences between the groups in terms of their cognitive or language or social skills. All children in that study received between 11 and 15 hours of intervention per week. (T. Vol. 6, pp 1029-31). The General consensus in the field regarding the use of a variety of educational approaches for children with autism is that there are a number of educational methods or programs that are effective for young children. The National Research Council report identified as a model or effective programs ten or twelve different programs across the country. (T. Vol. 6, pp 1031-32).

147. During the course of the discussion after Respondent proposed the placement in the developmentally delay and Title I classrooms, the parents wanted a 1:1 shadow-aide to follow *Student*. Throughout the course of his time with the Respondent in order to ensure he was benefitting from his time with Respondent; (Resp. Exh. #5, p. 132:16-133:1), 148:5-11, 155:20-156:2) and Resp. Exh. #5, p. 148:17-149:21).

148. Respondent refused to discuss the shadow-aide for *Student* at the March 14, 2008 IEP due to Respondent's unwritten policy (sometimes referred to as a "general practice").

149. The parents were not involved in the decision-making process in what parents asserted was a shadow-aide as a related service. The parents' input was received and considered as to the present level of performance and the goals for *Student*, but the delivery of services as to staffing would be made by Respondent. (T. Vol. 5, p. 165:11-169:25).

Based on the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the subject matter and parties to this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.
2. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.
3. Respondent is a local education agency receiving monies pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1500 *et seq.*
4. The controlling state law for students with disabilities is N.C. Gen. Stat. Section 115C, Article 9 and the corresponding rules adopted as defined in N.C. Gen. Stat. § 115C-106.3(19).
5. *Student* is a child with a disability for the purposes of the IDEA, 20 U.S.C. §1400 *et seq.* and a child with special needs within the meaning and definition of N.C. Gen. Stat. § 115C-106.3(1) and (2). Being classified as autistic, *Student* is entitled to a free appropriate public education (FAPE) from the LEA in which he is domiciled.
6. The parties agree that Petitioners have the burden of proof in this contested case. *Schaffer v. Weast*, 549 U.S. 49, 57-58. Petitioners have the burden of proof by the preponderance of the evidence. N.C. Gen. Stat. §150B-34(a). Black’s Law Dictionary defines preponderance: “[I]t denotes a superiority of weight or outweighing.” The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side. Thus, the Petitioners, being the complaining party, have the burden of proof to show by a preponderance of evidence that the Respondent did not provide *Student* with the opportunity of a free appropriate public education.
7. *Student* is entitled to the preparation and implementation of an Individualized Education Program (“IEP”) as defined in N.C. Gen. Stat. § 115-113(f) and 20 U.S.C. § 1414(d) because he is identified as a child with special needs. The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).
8. The United States Court of Appeals for the Fourth Circuit has reiterated that reviewing courts owe great deference to the IEP decisions made by the educators involved:

As the Court made clear in *Rowley*, once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals. Neither the district court

nor this court should disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child "the basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990)(citation omitted; quoting *Rowley*, 458 U.S. at 201).

9. To prevail on their claim for reimbursement for CARD services, Petitioners bear the burden of proving that (1) the educational program offered by Respondent is inappropriate **and** (2) the educational program they chose is appropriate. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373-374 (1985). [T]he Act does not require the 'furnishing of every special service necessary to maximize each handicapped child's potential.'" *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 101 (4th Cir. 1997) (quoting *Rowley*, 458 U.S. at 199-200, 102 S.Ct. 3034).

10. In *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 206 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The Court stated that:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

11. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefit. 20 U.S.C. 1415(f)(3)(e).

12. The parties are in agreement that Respondent refused to discuss with Petitioners the provision of a shadow-aide for *Student* at the March 14, 2008 IEP meeting as a related service. In a March 13, 2009 Order, this tribunal likewise found that Respondent refused to discuss the provision of a shadow-aide as a related service with Petitioners. Order p. 2.

13. If a procedural violation occurred that resulted in substantive harm, then there is no need to embark upon the second part of this inquiry. *W.G. v. Bd. of Trustees of Target Range Sch. District No. 23*, 960 F.2d 1479, 1485 (9th Cir. 1992) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. District, Westchester County v. Rowley*, 458 U.S. 176, 201 & 204-05 (1982)). "A procedural violation can cause substantive harm when it seriously infringes upon the parents' opportunity to participate in the IEP process." *Deal*, 392 F.3d at 859 (citations omitted).

14. In North Carolina, a parent must prove that procedural inadequacies either: “(i) impeded the child’s right to a free appropriate public education (ii) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or (iii) caused a deprivation of an educational benefit.” N.C. Gen. Stat. § 115C-109.8.

15. “With regard to procedural matters, a court should strictly review an IEP for procedural compliance, although technical deviations will not render an IEP invalid. . . . Only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of a FAPE, may relief be granted.” *Nack v. Orange City Sch. Dist.*, 609-10 (6th Cir. 2006) (quotations and citations omitted). The United States Supreme Court has emphasized the importance Congress attached to the IDEA's procedural safeguards:

[T]he congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Rowley, 458 U.S. at 206. That Court also emphasized that: “When the elaborate and highly specific procedural safeguards embodied in § 1415 [of the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.” *Id.* at 205.

16. Even conceding that Respondent arguably may have committed a procedural violation in developing the March 14, 2008, IEP for *Student*, Petitioners failed to carry their burden of proof in demonstrating that any such procedural violation impeded *Student*’s right to a FAPE, significantly impeded *Mother* or *Father*’s opportunity to participate in the decision making process regarding the provision of a FAPE to *Student*, or caused a deprivation of an educational benefit.

17. The IEP team meeting on March 14, 2008 was extensive and lengthy. There was ample detailed discussion of the program that Respondent offered to *Student*, including the division of his time between the developmental needs classroom and the Title I classroom. The IEP team also discussed the incorporation of Petitioners’ preferred methodology, the level of staffing that would be provided to *Student*, and the consultation services that would be provided by *Ms. L.S.*. With regard to staffing, given Petitioners’ expressed concerns about the level of support *Student* would need in the Title I classroom, the IEP team agreed that a teaching assistant from the special needs classroom would go with *Student* to the Title I classroom.

18. “Under the IDEA, a ‘free appropriate public education’ includes not only special education, but also ‘related services.’ Related services include ‘transportation ... and other supportive services ... as may be required to assist a child with a disability to benefit from special education.’” *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1527 (9th Cir. 1994) (quoting 20 U.S.C. §

1401(a)(17)). Parents failed to carry their burden of proof by a preponderance of the evidence that the provision of a shadow-aide was a related service according to 34 C.F.R. § 300.34. A related service must be a supportive service to the delivery of the main educational service that assists a child to benefit from special education. 34 C.F.R. § 300.34 enumerates examples of what would be considered a related service. The shadow-aide proved to be a key component of the parents' preferred methodology of 1.1 ABA. The choice of methodology must remain with the IEP team. However, if the Respondent refused to discuss or consider the parents' request for a related service as opposed to a selected methodology, Respondent is under a duty to meaningfully consider it. Respondent's refusal never amounted to a refusal to discuss a related service as the parents failed to establish the shadow-aide is a related service, and the undersigned cannot conclude that the shadow-aide was a related service. The shadow-aide was not an ancillary or supported service but a direct service required in the parents' preferred methodology for the delivery of direct ABA services.

19. After a review of all the evidence and giving all evidence its due weight, the undersigned finds that *Mother* and *Father* were not significantly impeded in their ability to participate in the decision making process regarding the provision of a FAPE for *Student*. The parents' opportunity to participate in the decision making process does not entitle them to have input in all of the decisions surrounding their child's education; just as methodological decisions are left to the judgment of professional educators, decisions about the day-to-day operations of the school, including staffing decisions, are also left to those responsible for operating those schools.

20. Petitioners' independent evaluator recommended that *Student* receive the support of a one-to-one aide in a regular education classroom. The weight of the evidence shows that Respondent intended for *Student* to receive the support of a teaching assistant in the Title I classroom with his nondisabled peers and that *Student* would always be supported in, at most, a three-to-one student to teacher ratio. Some utilization of a proposed aide in this circumstance demonstrated the manner in which the services were to be delivered but not the parents preferred method.

21. The parents assert that the provision of a shadow-aide would not merely assist *Student* in benefitting from the special education services offered by Respondent, but was essential to his so benefitting.

22. Respondent's refusal to discuss the shadow-aide impeded, albeit not significantly, the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*.

23. The manner of refusal was especially reprehensible to parents given the short and forceful manner in which said refusal was delivered to the parents at the March 14, 2008 IEP meeting.

24. The practice of denying parents meaningful participation in deciding staffing ratios for the delivery of special education services is an unwritten policy (or "general practice") of the Respondent.

25. The evidence of *Student*'s success at XX Elementary School, does not support a finding that *Student* required a one-on-one shadow-aide in a self-contained classroom in which *Student* would always be supported in, at most, a three-to-one student to teacher ratio, as offered by Respondent. The delivery of FAPE requires Respondent to deliver FAPE in the least restrictive environment.

26. Petitioners failed to establish that the goals and objectives, which they acknowledged were appropriate for *Student*, required the assignment of a one-to-one aide, or that they could only be provided in a one-to-one setting.¹

27. Predetermination amounts "to a procedural violation of the IDEA." *Deal*, 392 F.3d at 857. It can cause substantive harm, and therefore deprive a child of a FAPE, where parents are "effectively deprived" of "meaningful participation in the IEP process." *Id.*

28. However, predetermination is not synonymous with preparation. "[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *N.L. ex rel. Ms. C. v. Knox County Sch.*, 315 F.3d 688, 694 (6th Cir. 2003); *see also* 34 C.F.R. § 300, App. A, No. 32.

29. The Sixth Circuit has gone on to emphasize that this "[p]articipation must be more than mere form; it must be *meaningful*." *Deal*, 392 F.3d at 858 (citations omitted; emphasis in original).

30. The placement of nineteen and one-half (19.5) hours split between the developmentally delayed and Title I classrooms at ABC Elementary School never changed from the discussion during the January 8, 2008 IEP meeting, to the beginning of the placement discussion at the March 14, 2008 IEP meeting, and despite repeated concerns being raised by the parents at the March 14, 2008 IEP as to the provision of a shadow-aide and the number of hours of services. The undersigned cannot conclude, however, that Respondent predetermined placement. A key ingredient to parents' preferred methodology of 1:1 ABA services was the shadow-aide. Respondent's refusal to meaningfully discuss this aide as either a direct or related service is evidence of a rejection of parents' preferred methodology. One on one discrete ABA trials cannot be administered without a shadow-aide. To reject the discussion of the aide was tantamount to rejection of this methodology. However, Respondent insisted on developing the proposed IEP goals and objectives which were largely accepted by parents. Ultimately, the goals and objectives of the proposed IEP are found and concluded by the undersigned to deliver an educational benefit and FAPE. Respondent's rejection of a discussion of a shadow-aide, although evidence of predetermination does not overbear, in light of a proposed IEP with goals

¹ However, it must be remembered that parents did not elect to have a child that would be diagnosed with autism. Their struggle to find for *Student* the best possible educational services to assist *Student* with his educational goal is commendable. Their focus and concern for *Student*'s educational well being was often obscured in the process. In my estimation they are "champion" parents. It must also be remembered that IDEA is law that was enacted to assist parents, such as *Mother* and *Father*, with the education of special needs children.

and objectives accepted by the parents, and, thus, cannot rise to the level of such a finding by the preponderance of the evidence.

31. The greater weight of the evidence presented at hearing supports the conclusion that the program offered by Respondent accounted for *Student's* development and progress through March 2008 and the proposed IEP incorporated goals and objectives recommended by CARD as well as some recommendations by Dr. Perlman. Given the nature of *Student's* disability, the progress he had made over the previous year, the March 14, 2008, IEP did provide an educational benefit and FAPE and was appropriate, although the CARD program may have provided a greater benefit.

32. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. 300.115. In determining the educational placement of a child with a disability, each public agency must ensure that the placement is in the least restrictive environment ("LRE"). Under the LRE requirements of the IDEA, the placement must be (1) determined at least annually; (2) based on the child's IEP; and (3) as close as possible to the child's home. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. 300.116. The CARD ABA proposed methodology is more restrictive than the settings proposed and implemented by Respondent. Respondent's educational placement for *Student* was the least restrictive environment, notwithstanding that the CARD program may have delivered a superior educational benefit.

33. Federal and state law require that a student with disabilities be educated in the "least restrictive environment." See 20 U.S.C. § 1412(a)(5) (2009). A full-time placement with non-disabled regular education students is the least restrictive environment. The preschool placement offered by Respondent is far less restrictive than the CARD program, which provided extensive services in a one-on-one therapeutic setting. This setting did not provide opportunities for socialization or interaction with same-age peers, either disabled or non-disabled, notwithstanding that the CARD program may have delivered a superior educational benefit.

34. A private placement is proper under the IDEA if the education provided in the private placement is reasonably calculated to enable the child to receive educational benefits." *Deal*, 392 F.3d at 855 (internal citations omitted).

35. The CARD program was tailored to meet *Student's* specific and unique needs, including speech and occupational therapy.

36. *Student* made significant progress while with the CARD program.

37. One of Respondent's primary objections to the CARD program was lack of licensure on the part of some of the CARD staff. However, this line of argument has been foreclosed to Respondent by the United States Supreme Court when it said:

Nor do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards. Trident's deficiencies,

according to the school district, were that it employed at least two faculty members who were not state-certified and that it did not develop IEP's. As we have noted, however, the § 1401(a)(18) requirements-including the requirement that the school meet the standards of the state educational agency, § 1401(a)(18)(B)-do not apply to private parental placements. Indeed, the school district's emphasis on state standards is somewhat ironic. As the Court of Appeals noted, "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." Accordingly, we disagree with the Second Circuit's theory that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private" schools. Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

38. The CARD program was calculated and did enable *Student* to receive significant educational benefits. However, Respondent's 2008 proposed IEP was also found to deliver an educational benefit and FAPE. Once Respondent's proposed IEP is found to be appropriate, parents cannot prevail on their unilateral alternative placement, notwithstanding that this placement may provide a greater educational benefit or be a preferred methodology that results in a greater benefit. The undersigned has found and concluded that the CARD program provided a significant educational benefit, however, the undersigned finds and concludes also that the undersigned cannot second guess Respondent's choice of methodologies once Respondent's proposed IEP would have delivered an educational benefit and FAPE.

39. The restrictiveness of Petitioners' chosen program is one factor in evaluating the appropriateness of the program. The restrictive nature of the CARD program is a factor to be considered in the determination whether the CARD program was appropriate for *Student*

40. The March 2008 IEP included both Occupational Therapy and social goals. Some of the goals included in the March 2008 IEP, required peer interaction. Petitioners failed to introduce evidence sufficient to establish that *Student's* private program from February 2008 through February 2009 addressed *Student's* social and occupational therapy needs, or that it provided *Student* services in his least restrictive environment.

41. The parties agree that *Student* needed an occupational therapy goal. Occupational therapy (i) means services *provided by a qualified occupational therapist*; and (ii) includes (A) improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation; (B) improving ability to perform tasks for independent functioning if functions are impaired or lost; and (C) preventing, through early intervention, initial or further impairment or loss of function. 34 CFR 300.34(c)(6)(emphasis added). CARD does not employ occupational therapists.

42. The CARD program may have provided a "better" educational benefit for *Student* than the one he would have received in Respondent's proposed placement. IDEA does not require that Respondent provide the "best" program to *Student*. Consistent with state law, the educational

program must provide “full educational opportunity” to *Student* Gen. Stat. § 115C-106.1. Thus *Student* is entitled to an opportunity to reach his full potential commensurate with the opportunity given to other children – the opportunity for a sound basic education. *Leandro v. State of North Carolina*, 346 N.C. 336 (1997). The program that Respondent offered to *Student* at the March 14, 2008 IEP meeting was appropriate, provided *Student* with that opportunity, and provided a FAPE.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

1. Petitioners had the burden of proof on all issues pending before the Office of Administrative Hearings. Petitioners failed to show that Respondent committed a procedural violation that (1) impeded *Student's* right to a free appropriate public education, (2) significantly impeded his parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to *Student*, or (3) caused a deprivation of an educational benefit.
2. Petitioners also failed to show that the March 2008 IEP developed by *Student's* IEP team was inappropriate and it has been found to be appropriate, to provide an educational benefit and to provide FAPE. Thus, the appropriateness of the CARD program is moot in light of the foregoing finding.
3. Petitioners have failed to carry their burden of proof. Petitioners are not entitled to relief in this special education due process contested case.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the person designated by the State Board under N.C. Gen. Stat. § 115C-107.2(b)(9). The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Final Decision. N.C. Gen Stat § 115C-109.9 (a).

This the ____ day of August, 2009.

Julian Mann, III
Chief Administrative Law Judge